

IV. CONSOLIDATION OF PROCUREMENT GUIDELINES INTO 40 CFR PART 247

A. Overview of Consolidated Provisions

Currently, EPA's five existing procurement guidelines are codified in 40 CFR Parts 248, 249, 250, 252, and 253. In addition, 40 CFR Part 247 contains general guidance for purchasing products containing recovered materials; however, Part 247 pre-dates the 1984 amendments to RCRA and, therefore, does not address the statutory provisions requiring agencies to establish affirmative procurement programs.

In the April 20, 1994 proposed rule, EPA proposed to delete the outdated general guidance in Part 247 and to consolidate the existing five guidelines and new item designations into a new Part 247. (See 59 FR 18862.) The Agency did not receive any public comments on these proposed changes and, therefore, is finalizing the consolidation of the guidelines into 40 CFR Part 247 as described below. This consolidated Part 247 supersedes the previous Parts 248, 249, 250, 252, and 253.

The new Part 247, Comprehensive Procurement Guideline, contains two subparts: Subpart A - General, which includes the requirements of RCRA section 6002 and definitions, and Subpart B - Item Designations. This consolidation allows EPA to (1) specify the statutory requirements once, instead of repeating them in each individual guideline, (2) define all applicable terms in one subpart, instead of in each individual guideline, and (3) provide procuring agencies with one, central list of the designated items. Consolidating these provisions into one Part will make them easier for procuring agencies to locate and use. In addition, each of the five existing guidelines contains general sections addressing its purpose, scope, and applicability. The applicability sections of the guidelines do not contain identical text, which has created confusion among procuring agencies in the past. By consolidating the procurement guidelines into one Part, EPA will be avoiding duplication and ambiguity.

RCRA section 6002 and Executive Order 12873 require agencies to establish affirmative procurement programs for items designated by EPA. In addition, section 6002 requires agencies to review their specifications for designated items and revise them as necessary to permit the use of recovered materials to the maximum extent practicable. These requirements were explained in each of EPA's earlier guidelines and are now found in Subpart A of 40 CFR Part 247. Subpart A also contains applicable definitions found in RCRA, definitions used in the five existing procurement guidelines, and definitions for the items that EPA designates, including those being issued in today's final rule.

Subpart B of the new Part 247 contains EPA's designated list of items that are or can be made with recovered materials. The items are grouped into eight product categories: paper and paper products, vehicular products, construction products, transportation products, park and recreation products, landscaping products, non-paper office products, and miscellaneous products. The first category contains the designation of paper and paper products, while the

existing designations of lubricating oil containing re-refined oil and retread tires are found in the vehicular products category, and the existing designations of cement and concrete containing fly ash and building insulation products containing recovered materials are included in the construction products category.

B. Summary of Comments and Agency's Response

No commenters opposed the consolidation of the five existing procurement guidelines previously codified in 40 CFR Parts 248, 249, 250, 252, and 253 into a new Part 247. Additionally, no one opposed the deletion of the outdated general guidance previously contained in 40 CFR Part 247.

V. PURPOSE, SCOPE, AND APPLICABILITY

Subpart A of Part 247 as amended by the CPG, is primarily a consolidation of the general provisions of the five existing guidelines. In the following sections, EPA discusses the provisions of Subpart A as amended, identifying which regulatory provisions and preamble discussions are repeated from earlier procurement guidelines and which are new provisions being finalized by the CPG.

A. Purpose and Scope

Section 247.1 as amended by the CPG, is primarily a consolidation of the purpose and scope sections of the five existing procurement guidelines. In addition, paragraph (b) references the Recovered Materials Advisory Notice, consistent with the procurement guidelines process established by E.O. 12873.

B. Applicability

Section 247.2 as amended by the CPG, is a consolidation of the applicability sections of the five existing procurement guidelines. This section of the document addresses who is a "procuring agency" and to which purchases the statutory requirements apply. Most of the following discussion is repeated from the preambles of the five existing procurement guidelines for the convenience of the reader. The only change is in Subsection 2, which is new and responds to concerns raised by other Federal agencies regarding the applicability of RCRA section 6002 to private party recipients of Federal monies other than through contracts.

1. Summary of Comments and Agency's Response

The Agency received a number of comments on the Purpose, Scope, and Applicability of the procurement guidelines.

a. Applicability to leases. One commenter inquired about the applicability of RCRA section 6002 to designated items that are leased rather than purchased by a procuring agency.

Section 6002 applies to "any purchase or acquisition" in excess of \$10,000 by a procuring agency. The Federal Acquisition Regulation (FAR) defines "acquisition" to include the acquiring of supplies or services (including construction) by means of a lease (48 CFR Section 2.101). Therefore, RCRA section 6002 and the procurement guidelines developed under its authority apply to a procuring agency's lease contracts for designated items. Under the definition of "procuring agency," lessor contractors are subject to the section 6002 requirements for work performed under the lease contract.

b. Applicability to contractors. Commenters inquired when RCRA section 6002 applies to contractors.

The requirements of RCRA section 6002 apply to contractors in the following circumstances. A contractor must comply with section 6002 with respect to work performed under the contract if the contractor is (1) contracting with a Federal agency or a state agency which is using appropriated Federal funds for a procurement and (2) purchasing or acquiring a designated item whose purchase price exceeds \$10,000 or the quantity of which purchased in the previous year was \$10,000 or more.

Under both circumstances, it is immaterial for purposes of the \$10,000 threshold whether the contractor purchased or acquired the designated items as a "procuring agency" (with respect to work performed under a contract with a Federal or state agency) or in its private capacity. All the purchases of a designated item should be aggregated in order to determine whether the \$10,000 threshold for section 6002 applicability is met. However, the obligations of section 6002 are prospective. The contractor must determine whether the \$10,000 threshold is met only after it is a "procuring agency." That is, purchases exceeding the \$10,000 threshold in the year prior to the year in which a contractor becomes a "procuring agency" do not trigger section 6002(a) requirements. Furthermore, while the contractor is subject to the section 6002 requirements once it exceeds the threshold, those requirements apply only with respect to work performed under the contract (i.e., when supplying the designated item to any state or Federal agency).

For example, in Year One, Contractor X contracts to supply \$500 of hydraulic mulch to a state agency using appropriated Federal funds to purchase the hydraulic mulch. Therefore, in Year One, Contractor X is a "procuring agency." During Year One, Contractor X also purchases hydraulic mulch for its own use and to supply the requirements of its other customers, with total purchases of hydraulic mulch exceeding \$10,000. In Year One, while Contractor X is a procuring agency, Contractor X is not subject to the section 6002 requirements for hydraulic mulch supplied to the state agency because the contract price does not exceed \$10,000. In Year Two, Contractor X is subject to section 6002 requirements for hydraulic mulch provided to the state agency for the procurement regardless of the amount of the contracted purchase, because, while a "procuring agency" in Year One, it purchased in excess of \$10,000 of hydraulic mulch.

In another example, in Year One, Contractor Y purchases \$10,000 of hydraulic mulch but none was purchased on behalf of a government agency using appropriated Federal funds. In Year One, Contractor Y is not a procuring agency. In Year Two, Contractor Y contracts to supply less than \$10,000 of hydraulic mulch to a state agency using appropriated Federal funds for the purchase. In Year Two, Contractor Y is a procuring agency, but is not subject to section 6002 requirements for its purchases of hydraulic mulch because it was not a procuring agency during the previous year when it acquired in excess of \$10,000 of hydraulic mulch.

2. Statutory Provisions

Many of the requirements of RCRA section 6002 apply to "procuring agencies," which are defined in RCRA section 1004(17) as "any Federal agency, or any State agency or agency of a political subdivision of a State that is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract." Under the statute, responsibility for complying with RCRA section 6002 rests with each individual procuring agency.

Under RCRA section 6002(a), the procurement requirements apply to any purchase by procuring agencies of an item costing more than \$10,000 or when the procuring agencies purchased \$10,000 worth of the item or of functionally equivalent items during the preceding fiscal year. The requirements apply to both direct and indirect purchases.

3. Who is a Procuring Agency?

The statutory definition of procuring agency identifies three types of "agencies": (1) Federal agencies, (2) state or local agencies using appropriated Federal funds, and (3) contractors. Based on the statutory language, EPA believes that government agencies and their contractors are or can become "procuring agencies," but private recipients of Federal funds other than through contracts are not procuring agencies and, therefore, are not subject to RCRA section 6002.

EPA concluded that, under the statutory definition, a Federal agency is always a procuring agency because the requirements of RCRA section 6002 apply to Federal agencies whether or not appropriated Federal funds are used for procurement of designated items. It should be noted, however, that the requirements of section 6002 apply only when a Federal agency procures a designated item. The statutory requirements do not apply to a Federal agency when it simply disburses funds to a state or local agency because, in that instance, the Federal agency is not purchasing or acquiring anything. In this case, the state or local agency is a procuring agency and must comply with these guidelines if they use the appropriated Federal funds for procurement of designated items.

The statutory definition of procuring agency also includes any person contracting with a defined Federal, state, or local agency. A contractor is a "procuring agency" and subject to section 6002 when procuring designated items for work performed under a contract with a

Federal agency, or a contract with a state or local agencies where appropriated Federal funds are used.

Because RCRA is explicit in identifying only government agencies and their contractors as "procuring agencies," EPA concluded that private party recipients (e.g., non-profit organizations, individuals) of Federal loans, grants, or funds under a cooperative agreement are not procuring agencies. This is true whether the originator of the grant, loan, or cooperative agreement is a Federal agency or a state or local agency recipient of Federal funds. In new §247.2, EPA is including a new subparagraph (c)(2) regarding private party recipients of Federal funds to reflect this revised interpretation of RCRA section 6002.

4. To Which Purchases Does Section 6002 Apply?

As previously noted, the following discussion is a consolidation of similar discussions in the existing procurement guidelines and is included for the convenience of the reader.

Purchases made as a result of a solicitation by procuring agencies for their own general use or that of other agencies (e.g., purchases by GSA's Federal Supply Service) are "direct" purchases. Purchases of items as part of a contract are also "direct" purchases.

The definition of "procuring agency" makes it clear that the requirements of section 6002 also apply to "indirect purchases," i.e., purchases by a state or local agency using appropriated Federal funds or, in some instances, its contractors. In other words, section 6002 applies to purchases of designated items meeting the \$10,000 threshold made by states, political subdivisions of states, or their contractors.

However, the guideline does not apply to such purchases if they are unrelated to or incidental to the Federal funding, i.e., not the direct result of the grant, loan, or funds disbursement. For example, if an entity has a Federal grant or contract to do research and builds or expands a laboratory to conduct the research, the construction is incidental to the grant or contract, as is the purchase of construction materials.

The guideline applies whenever Federal monies, including block grants, are used, whether or not they are commingled with non-Federal funds.

5. What is the \$10,000 Threshold?

As previously noted, the following discussion is a consolidation of similar discussions in the existing procurement guidelines and is included for the convenience of the reader.

RCRA section 6002(a) provides that the procurement requirements of the statute apply (1) when the purchase price of an item exceeds \$10,000 or (2) when the quantity of such items or of functionally equivalent items purchased during the preceding fiscal year was \$10,000 or more.

Thus, RCRA section 6002 clearly sets out a two-step procedure for determining whether the \$10,000 threshold has been reached. First, procuring agencies must determine whether they purchased \$10,000 worth of a designated item or functionally equivalent items during the preceding fiscal year. If so, the requirements of section 6002 apply to all purchases of these items occurring in the current fiscal year. Second, if the procuring agencies did not procure \$10,000 worth of a designated item during the preceding fiscal year, they are not subject to RCRA section 6002 unless, in the current fiscal year, they make a purchase of the item exceeding \$10,000. The requirements of RCRA section 6002 then apply to the \$10,000 purchase of the designated item; to all subsequent purchases of the item made during the current fiscal year, regardless of size; and to all procurements of the designated item made in the following fiscal year.

Section 6002(a) does not specify that the procurement requirements are triggered when the aggregate quantity of items purchased during the current fiscal year is \$10,000 or more. Therefore, EPA does not believe that Congress intended to require procuring agencies to keep a running tally during the year of procurements of designated items. Maintaining such a running tally would be very burdensome. Rather, procuring agencies need only compute their total procurements of a designated item once at the end of the fiscal year and only if they intend to claim an exemption from the requirements of RCRA section 6002 in the following fiscal year.

Finally, Federal agencies should note that the requirements of RCRA section 6002 apply to each Federal agency as a whole. This point is particularly important in determining whether the \$10,000 threshold has been reached. During each fiscal year, each major Federal agency as a whole, purchases, or causes the purchase of, more than \$10,000 worth of many of the designated items. Therefore, the requirements of section 6002 will apply to all procurements of these items by these agencies and their subunits.

a. Summary of comments and agency's response. One commenter questioned EPA's interpretation of the applicability of the \$10,000 threshold to Federal agencies as a whole. The commenter stated that the definition of "procuring agency" is inconsistent with the definition of a "procuring activity" as defined in the FAR.

The discussion of the \$10,000 threshold in the proposed CPG was a consolidation of similar discussions found in the preambles to the paper, oil, tires, and building insulation procurement guidelines. EPA requested comment on this issue during the development of those guidelines and, therefore, did not request comment on it in the proposed CPG.

However, to resolve any question about inconsistencies between the CPG and the FAR, EPA notes that its interpretation that the \$10,000 threshold applies to a Federal agency as a whole stems from the RCRA definitions of "procuring agency" and "Federal agency." RCRA Section 1004(17) defines a procuring agency as "any Federal agency, ..." RCRA Section 1004(4) further defines a Federal agency as "any department, agency, or other instrumentality of the Federal government, including any Government corporation and the Government Printing Office." All of

the entities described in the definition are "whole" agencies, and are therefore subject to the requirements of RCRA Section 6002, including the \$10,000 threshold.

Further, EPA does not believe that the FAR and RCRA definitions are inconsistent because they define different terms. A "procuring activity" is vastly different from a "procuring agency." EPA believes that if Congress had meant to apply the \$10,000 threshold to a procuring activity, it would have done so.

VI. DEFINITIONS

Most of the definitions found in new §247.3 are the same as those used in the five existing procurement guidelines. EPA has concluded that it is easier for procuring agencies to use the definitions if they are limited to those terms used in the CPG (and do not include any definitions specific to the RMAN). Therefore, in the final CPG, the definitions section contains only terms used in the CPG. The terms "recovered materials," "procuring agency," "person," and "Federal agency" are defined the same as in RCRA. "Postconsumer paper" has the same definition as used in EPA's 1988 paper procurement guideline as derived from the statutory definition of "recovered materials" applicable to paper and paper products. Other terms are standard industry or purchasing definitions (e.g., purchasing, specification). EPA requested comment on these definitions and the definition of "practicable" during the development of the existing five procurement guidelines and, therefore, did not request comment on them in the proposed CPG.

A. Summary of Comments and Agency's Response

A commenter recommended that EPA revise the general definition of "postconsumer material" to be consistent with the general definition of "recovered materials" found in RCRA. Specifically, the definition of "postconsumer material" proposed in the CPG included the phrase "has been discarded for disposal or recovery." The commenter suggested that this phrase be replaced with "has been diverted or recovered from waste destined for disposal." EPA agrees that the recommended phrase is more consistent with the RCRA definition and also better reflects the fact that the material in question has been recovered or diverted from the waste stream. In the final CPG, EPA revised the definition of "postconsumer material" accordingly.

EPA also added the following item-specific terms: hydraulic mulch, hydroseeding, laminated paperboard, and structural fiberboard. They are based on industry definitions, including ASTM or other standard specifications, or represent descriptions of the scope of items being designated. EPA specifically requested, but did not receive, comments on each of these definitions.

VII. THE AFFIRMATIVE PROCUREMENT PROGRAM

RCRA section 6002(i) requires that, within one year after EPA designates an item, each procuring agency purchasing more than \$10,000 of that item, or functionally equivalent items, in a fiscal year must establish an affirmative procurement program for that item. ("Procuring agency" is discussed in section V.B.3; \$10,000 threshold is discussed in section V.B.5) Section 402 of Executive Order 12873 reinforces this requirement and further provides that Executive agencies "shall ensure that their affirmative procurement programs require that 100 percent of their purchases of products meet or exceed the EPA guideline standards," considering competition, price, availability, and performance.

An affirmative procurement program is an agency's strategy for maximizing its purchases of an EPA-designated item. The affirmative procurement program should be developed in a manner that assures that items composed of recovered materials are purchased to the maximum extent practicable consistent with Federal procurement law. RCRA section 6002(i) requires that, at a minimum, an affirmative procurement program consist of four elements: (1) a preference program; (2) a promotion program; (3) procedures for obtaining estimates and certifications of recovered materials content and, where appropriate, reasonably verifying those estimates and certifications; and (4) procedures for monitoring and annually reviewing the effectiveness of the affirmative procurement program. In addition, section 402 of Executive Order 12873 requires an agency affirmative procurement program to encourage the electronic transfer of documents, the two-sided printing of government documents, and the inclusion of provisions in contracts, grants, and cooperative agreements that require documents to be printed two-sided on recycled paper.

In previous guidelines, EPA recommended that specific actions be taken by requesting officials, contracting officers, and architects and engineers when purchasing designated items. In consulting with acquisition policy and requirements officials from several major Federal agencies, EPA determined that these item-specific recommendations did not provide enough flexibility for procuring agencies to determine the appropriate delineation of responsibilities for implementing the requirements of RCRA section 6002. Based on this information and because of the broad array of products designated in the CPG, EPA will no longer make specific recommendations for individuals within an agency to implement the requirements of RCRA section 6002 and Executive Order 12873. Instead, EPA recommends that the Environmental Executive within each major procuring agency take the lead in developing the agency's affirmative procurement program and in implementing the requirements set forth in the CPG. This recommendation is consistent with the basic responsibilities of an Agency Environmental Executive as described in sections 302 and 402 of Executive Order 12873. Section 302 charges each Agency Environmental Executive with coordinating all environmental programs in the areas of acquisition, standard and specification revision, facilities management, waste prevention, recycling, and logistics. Section 402(c) of the E.O. further requires each Agency Environmental Executive to track and report, to the Federal Environmental Executive, agency purchases of EPA-designated items. In the absence of such an individual, EPA recommends that the head of the implementing agency appoint an individual who will be responsible for ensuring the agency's compliance with RCRA section 6002 and Executive Order 12873.

RCRA and the Executive Order require procuring agencies to establish affirmative procurement programs for each item EPA designates. In fulfilling this requirement, EPA recommends that each agency develop one comprehensive affirmative procurement program with a structure that provides for the integration of new items as they are designated. EPA encourages agencies to implement preference programs for non-designated items as well, in order to maximize their purchases of recycled content products and, thereby, create markets for additional recovered materials.

A. Specifications

RCRA section 6002(d)(1) requires Federal agencies responsible for drafting and reviewing specifications for procurement items purchased by Federal agencies to review and revise their specifications and remove requirements specifying virgin materials only or excluding the use of recovered materials. This revision process should have been completed by May 8, 1986. For items designated by EPA, section 6002(d)(2) directs Federal agencies to revise their specifications to require the use of recovered materials to the maximum extent possible without jeopardizing their intended end-use. For the items previously designated by EPA (i.e., paper and paper products, re-refined lubricating oil, retread tires, building insulation, and cement and concrete containing fly ash), procuring agencies were required to have completed their revisions within one year after each item designation. For the new items designated in the CPG, agencies must complete these revisions within one year after the date of publication of the CPG, as required by RCRA section 6002(d)(2).

As discussed in section II.C.2 of this document, sections 501, 504, 505, and 506 of Executive Order 12873 also address Federal specification requirements. Section 501 of the Order requires Executive agencies to review and revise their specifications, product descriptions, and standards to enhance Federal procurement of products containing recovered materials. When agencies convert to Commercial Item Descriptions, they are required to ensure that the Commercial Item Descriptions meet or exceed the recovered materials requirements in the specifications or product descriptions they replace.

B. Preference Program

A preference program is the system by which an agency implements its stated "preference" for purchasing products containing recovered materials. RCRA section 6002(i)(3) requires procuring agencies to consider the following options when implementing their preference programs: minimum content standards, case-by-case policy development, or a substantially equivalent alternative.

To assist procuring agencies in establishing their preference programs, when EPA designates an item, it examines these statutory options and recommends the approach it believes to be the most effective for purchasing the designated item. Procuring agencies may elect either to adopt EPA's recommended approach or to develop their own approaches, provided that, in

accordance with section 402 of the Executive Order, the selected approach meets or exceeds EPA's recommendations.

1. Minimum Content Standards

The first approach specified in RCRA section 6002(i)(3) is the establishment of minimum content standards. RCRA section 6002(i)(3)(B) requires that procuring agencies establish minimum content standards requiring the maximum amount of recovered materials content available for that item, without jeopardizing the intended end use of the item.

To assist procuring agencies with establishing their minimum content standards, EPA recommends recovered materials content levels, where appropriate, for most of the items it designates. EPA notes that under RCRA section 6002(i), it is the procuring agency's responsibility to establish minimum content standards, while EPA provides recommendations regarding the levels of recovered materials in the designated items. To make it clear that EPA does not establish minimum content standards for other agencies, EPA will no longer refer to its recommendations as "minimum content standards," as was done in previous guidelines. Instead, EPA will refer to its recommendations as "recovered materials content levels," consistent with RCRA section 6002(e) and Executive Order 12873.

As required by E.O. 12873, EPA changed its approach to establishing recovered materials content levels. For items designated in previous guidelines, with the exception of retread tires, EPA recommended one recovered materials content level that represented the national minimum levels for procuring agencies to use when requesting designated items. EPA is now recommending recovered materials content ranges within which the items are available. EPA recommends that procuring agencies use these ranges, in conjunction with their own research into the recovered materials content of items available to them, to establish their minimum content standards. In some instances, EPA will recommend one level (e.g., 100 percent recovered materials), rather than a range, because the item is universally available at the recommended level. The methodology that EPA uses to establish recovered materials content ranges for the items that the Agency designates is described in section II.E.

2. Case-by-Case Policy Development

The second approach specified in RCRA section 6002(i)(3) is case-by-case policy development. RCRA section 6002(i)(3)(A) describes case-by-case policy development as "a policy of awarding contracts to the vendor offering an item composed of the highest percentage of recovered materials practicable," subject to the limitations of RCRA section 6002(c)(1)(A) through (C) (i.e., competition, price, availability, and performance). The case-by-case approach is appropriate where a procuring agency determines that the minimum content standard it has established for a particular designated item is not appropriate for a specific procurement action (i.e., the procuring agency is unable to acquire the item within the limitations described in RCRA). The case-by-case approach allows a procuring agency to specify different (usually lower)

minimum content standards for specific procurement actions, while still ensuring that the agency fulfills its responsibility to procure the designated item containing the highest amount of recovered materials practicable.

This approach is not intended to obviate the need for an agency minimum recovered materials content standard. It should be applied to singular procurement actions only where the agency's minimum content standard is unattainable. If a procuring agency determines that it is consistently unable to procure an EPA-designated item using the minimum content standard it establishes, then the agency should evaluate its needs and adjust its content standard accordingly.

3. Substantially Equivalent Alternative

The third approach specified in RCRA section 6002(i)(3) is a substantially equivalent alternative to minimum content standards and case-by-case policy development. For some items, the use of minimum content standards is inappropriate because the product is remanufactured, reconditioned, or rebuilt (e.g., remanufactured toner cartridges). In these instances, EPA recommends that procuring agencies use a substantially equivalent alternative. For example, as discussed in the draft RMAN (see 59 FR 18865, April 20, 1994), in the case of remanufactured toner cartridges, EPA recommends that procuring agencies establish a two-pronged program consisting of (1) remanufacturing their expended toner cartridges and (2) purchasing remanufactured toner cartridges when new cartridges are needed. Minimum content standards are inapplicable because the recovered material is the expended toner cartridge, rather than the individual components used to produce a new cartridge. However, in instances where the procuring agency is purchasing new toner cartridges made from recovered materials (e.g., plastic), a minimum content standard would be appropriate.

4. Requirements for Contractors and Grantees

Government contractors and state and local government agency recipients of appropriated Federal funds, including assistance funds, are also subject to the requirements of RCRA section 6002. These requirements are applicable where the contractor or state or local government agency uses appropriated Federal funds and purchases \$10,000 worth of an EPA designated item or purchased \$10,000 or more of the item in the previous year. Section V.B.2 describes the applicability of RCRA section 6002 to government contractors and state and local government agencies in further detail.

5. Exceptions

A procuring agency may not always be able to purchase a designated item with recovered materials content. RCRA section 6002(c)(1) allows a procuring agency to make an exception to purchasing an EPA-designated item with recovered materials content based on the following determinations:

- (1) The agency is unable to secure a satisfactory level of competition.
- (2) The item is not reasonably available within a reasonable period of time.
- (3) The item fails to meet the reasonable performance standards set forth in the agency's specification.
- (4) The item is available only at an unreasonable price.

Section 402 of Executive Order 12873 further requires that, if a procuring agency does not purchase an EPA-designated item with recovered materials content, it must provide a written justification specifying one or more of the exceptions listed above.

a. Price. In previous guidelines, EPA defined an unreasonable price as a price that is greater than the price of a competing product made from virgin materials. EPA further interpreted the reasonable price provision of RCRA section 6002(c)(1)(C) to mean that there is no projected or observed long-term or average increases over the price of competing virgin items. This interpretation is supported in the preamble to OFPP Policy Letter 92-4 (57 FR 53364), which provides that there is no legal mandate to provide a price preference for products containing recovered materials over similar virgin products.

b. Competition. EPA recommends that determinations of "satisfactory" competition be made in accordance with the procuring agency's procurement requirements.

c. Availability and performance. Information on the economic and technological feasibility of producing each designated item, including the availability and number of manufacturers that produce the item, the ability of the item to meet Federal or national specifications, the recovered materials content levels used by manufacturers to produce the item, and other information can be found in the item-specific discussions in this document and in the "RMAN for Items Designated in the Comprehensive Procurement Guideline -- Supporting Analyses."

C. Promotion Program

RCRA section 6002(i)(2)(B) requires each procuring agency to adopt a program to promote its preference to buy EPA-designated items with recovered materials content. The promotion component of the affirmative procurement program educates staff and notifies an agency's current and potential vendors, suppliers, and contractors of the agency's intention to buy recycled content products.

In the previous guidelines, EPA targeted its recommendations for promoting the affirmative procurement program at the agency's vendors and contractors. EPA has determined that the education of an agency's employees is also an important part of the promotion program.

Therefore, EPA believes that an agency's promotion program should consist of two components: an internal promotion program and an external promotion program.

1. Internal Promotion

There are several methods that procuring agencies can use to educate their employees about their affirmative procurement programs. These methods include preparing and distributing agency affirmative procurement policies, publishing articles in agency newsletters and publications, including discussions of an agency's affirmative procurement program in staff and technical manuals, and conducting workshops and training sessions to educate employees about their responsibilities under an agency's affirmative procurement program.

2. External Promotion

Methods for educating existing contractors and potential bidders of an agency's preference to purchase products containing recovered materials include publishing articles in appropriate trade publications, participating in vendor shows and trade fairs, placing statements in solicitations, and discussing an agency's affirmative procurement program at bidders' conferences.

D. Estimation, Certification, and Verification

RCRA section 6002(i)(2)(C) requires the affirmative procurement program to include procedures for estimating, certifying, and, where appropriate, reasonably verifying the amount of recovered materials content utilized in the performance of a contract. RCRA section 6002(c)(3) further provides "the contracting officer shall require that vendors (A) certify that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements and (B) estimate the percentage of the total material utilized for the performance of the contract which is recovered materials."

E. Procedures to Monitor and Review the Procurement Program

Procuring agencies should monitor their affirmative procurement programs to ensure that they are fulfilling their requirements to purchase items composed of recovered materials to the maximum extent practicable. RCRA section 6002(i)(2)(D) requires the affirmative procurement program to include procedures for annually reviewing and monitoring the effectiveness of an agency's affirmative procurement program. Section 402 of Executive Order 12873 requires the Environmental Executive of each Executive agency to track and report on agency purchases of EPA-designated items. Additionally, RCRA section 6002(g) requires the Office of Federal Procurement Policy (OFPP) to submit a report to Congress every two years on actions taken by Federal agencies to implement the affirmative procurement requirements of the statute. Also, section 301 of Executive Order 12873 requires the Federal Environmental Executive to submit a report annually, at the time of agency budget submission, to the Office of

Management and Budget (OMB) on Executive agency compliance with the Order. In order to fulfill their responsibilities, EPA anticipates that the Federal Environmental Executive and OFPP will request information from appropriate Federal agencies on their affirmative procurement practices. Therefore, it is important for agencies to monitor their affirmative procurement programs to ensure compliance with RCRA section 6002 and Executive Order 12873.

In order to comply with the Executive Order, agencies will need to evaluate their purchases of products containing recovered materials. This will also allow them to establish benchmarks from which progress can be assessed. To evaluate their procurements of products containing recovered materials, procuring agencies may choose to collect data on the following:

- (1) The approximate percentages of recovered materials content in the items procured or offered;
- (2) Comparative price information on competitive procurements;
- (3) The quantity of each item procured over a fiscal year;
- (4) The availability of each item with recovered materials content; and
- (5) Performance information related to recovered materials content of an item.

EPA recognizes that a procuring agency may be unable to obtain accurate data for all items designated by EPA. However, EPA believes that estimates will be sufficient to determine the overall effectiveness of an agency's affirmative procurement program.

F. Summary of Comments and Agency's Response

a. Administrative requirements. Several commenters expressed concern with the administrative requirements associated with individual item designations. In particular, many commenters objected to the requirement that procuring agencies develop affirmative procurement programs for all designated items, including items that they may not purchase or that they are unable to obtain with recovered materials content. In addition, a few commenters questioned the benefit of developing an affirmative procurement program, particularly the monitoring and reporting aspects, for items they already purchase with recovered materials content.

In the proposed CPG (59 FR 18864, April 20, 1994), EPA recommended that procuring agencies develop one comprehensive affirmative procurement program with a structure that provides for the integration of new items as they are designated. EPA believes that developing a single affirmative procurement program will substantially reduce procuring agencies' administrative responsibilities under RCRA.

EPA also recommends that if a procuring agency does not purchase a specific designated item, it should simply include a statement in its preference program to that effect. Similarly, if a procuring agency is unable to obtain a particular item for one or more of the reasons cited in RCRA section 6002(c)(1), a similar statement should be included in the preference program along with the appropriate justification.

For example, if a state agency procures cement and concrete using appropriated Federal funds and has determined that ground granulated blast furnace slag is not available in the state due to high transportation costs, then that state agency would include the following or similar statement in its preference program:

The State currently is unable to use ground granulated blast furnace slag in cement and concrete products due to the high transportation costs of this material. Therefore, this State has concluded that, based on RCRA section 6002(c)(1)(C), it is not required to procure this material.

EPA notes that, in accordance with RCRA section 6002(i)(2)(D), it is the procuring agency's responsibility to monitor and regularly update its affirmative procurement program. Should an item that was previously unobtainable become available, then the procuring agency should modify its affirmative procurement program accordingly.

In addition, to meet the affirmative procurement requirements for items already purchased, EPA recommends that a procuring agency note in its affirmative procurement program which designated items it already purchases. EPA further notes that because Federal agencies are the only procuring agencies that are required to report under the statute there is no administrative burden on state and local agencies associated with recordkeeping. Recordkeeping and reporting requirements are discussed in further detail in Section VII.F.

b. Exceptions to affirmative procurement. Two commenters requested that EPA provided further information on the four exceptions to purchasing EPA-designated items. Other commenters requested that EPA include a definition of "unreasonable price."

EPA has included these discussions in Section VII.C.5 above.

c. Certifications. One commenter requested that EPA include a recommendation that procuring agencies, in complying with the certification requirement of RCRA section 6002(c)(3)(A), require that vendors submit certifications when offers are submitted.

Although EPA included such a recommendation in the preamble to the building insulation guideline (54 FR 7351, February 17, 1989), the Agency now believes that it is appropriate to leave the decision of when to obtain certifications from vendors to the individual procuring agencies. Obtaining certifications are a standard part of procurement, and contracting officers are

in the best position to determine at what points in their acquisition processes certifications are needed.

VIII. CATEGORIES OF ITEM DESIGNATIONS

To organize the designated items, EPA developed the following product categories: paper and paper products, vehicular products, construction products, transportation products, park and recreation products, landscaping products, non-paper office products, and miscellaneous products. The categories were developed to describe the application of each designated item.

- Paper and Office Paper Products - as defined in 40 CFR 247.3 (old 40 CFR 250.4(aa)). This category excludes paper and paper products used in construction applications.
- Vehicular Products - products used in repairing and maintaining automobiles, trucks, and other vehicles. Examples of vehicular products include lubricants, bumpers, mud flaps, and engine coolant.
- Construction Products - products used in constructing roads and the interior and exterior components of commercial and residential buildings.
- Transportation Products - products used for directing traffic, alerting drivers, and containing roadway noise and pollution. Examples of transportation products include safety cones, traffic signs, and sound barriers.
- Park and Recreation Products - products used in operating and maintaining parks and recreational areas. Examples of park and recreation products include playground equipment and running tracks.
- Landscaping Products - products used to contain, maintain, or enhance decorative and protective vegetation or areas surrounding buildings and roadways. Examples of landscaping products include compost, garden implements, and landscape timbers.
- Non-Paper Office Products - equipment and accessories used by government agencies and businesses to perform daily operational and administrative functions of an office. Examples of non-paper office products include toner cartridges, desktop accessories, and waste receptacles.
- Miscellaneous Products - includes all other products not covered by the categories listed above.

No commenters opposed the item categories. In the final CPG, EPA used the categories as proposed.

IX. PAPER AND PAPER PRODUCTS

As previously discussed in this document, EPA issued a paper procurement guideline in 1988. The guideline establishes recovered materials content levels for various paper products, including printing and writing papers. Section 504 of Executive Order 12873 establishes minimum content levels for specified uncoated printing and writing papers purchased by Federal executive agencies. These levels replace EPA's 1988 recommendations.

On March 15, 1995, EPA issued a draft Paper Products RMAN to revise the existing procurement guideline for paper and paper products (see 60 FR 14182). That draft RMAN incorporates the minimum content levels established by the Executive Order, recommends recovered materials levels for other paper products, and revises some of the definitions used in the 1988 guideline. In addition, the draft paper RMAN addresses a variety of issues that have been raised as procuring agencies have implemented affirmative procurement programs for paper products containing recovered materials. In the CPG, EPA includes the existing paper and paper products designation and related definitions issued in 1988. The CPG will be amended, as needed, to include any changes resulting from the issuance of the final paper RMAN. EPA is not including any of the 1995 draft recommended recovered materials content levels for paper products in Part A of the RMAN because the Agency is still accepting comments on them. When the final Paper Products RMAN is issued, the recommendations will replace the recommendations made for paper products in Part A of the RMAN.

Federal Executive agencies should note that, beginning December 31, 1994, the recycled content levels in the Executive Order are applicable to their purchases of printing and writing papers.